Royal Coach Sprinklers, Inc. *and* International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, Local Lodge No. 653. Cases 32-CA-3975, 32-CA-4145, and 32-RC-1436

21 February 1984

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 14 February 1983 Administrative Law Judge Richard D. Taplitz issued the attached decision. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge's conclusion that the Respondent's November 1981[2] layoff of many of its foundry employees was motivated by economic and not union considerations. While the layoff occurred just shortly after foundry employees had selected the Union as collective-bargaining representative, the record established that the Respondent's sales had plummeted from $1,240,000 in June to $400,000 in November. The General Counsel argues that the Respondent exaggerated the extent of its economic problems and notes that the Respondent granted employees a wage increase in November just before the layoff. While the granting of a wage increase arguably may seem inconsistent with a layoff motivated by economic considerations, we note that the Respondent's controller, Owen Glahn, testified that this increase was granted to be consistent with the Respondent's having granted a similar increase in November 1980. The Respondent also points out that it has never claimed an inability to pay labor costs and notes that, because of falling sales, it simply had no need to incur the expense related to unnecessary production. In these circumstances, and based on the judge's findings as a whole, we conclude that the General Counsel has not established that the Respondent's layoff of its foundry employees was motivated by unlawful considerations.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, Local Lodge No. 653, and that said labor organization is not the exclusive representative of all the employees in the unit herein involved within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: These consolidated cases were heard at Fresno, California, on October 13, 14, 15, 18, 19, and 20, 1982. The charge, first amended charge, and second amended charge in Case 32-CA-3975 were filed respectively on October 2 and 8, and December 28, 1981, by International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, Local Lodge No. 653, herein called the Union. The charge and first amended charge in Case 32-CA-4145 were filed on December 18, 1981, and February 23, 1982, respectively, by the Union. An order consolidating Cases 32-CA-3975 and 32-CA-4145, together with a consolidated complaint, issued on February 26, 1982. The complaint alleges that Royal Coach Sprinklers, Inc., herein called the Company, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended.

On August 4, 1981, the Union filed a petition for an election in Case 32-RC-1436. Pursuant to a Stipulation for Certification Upon Consent Election approved on September 21, 1981, an election by secret ballot was con-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the General Counsel contends in essence that the judge's credibility resolutions, factual findings, and legal conclusions are the result of predisposition to a particular position. After carefully examining the record, we are satisfied that this contention lacks merit. There is no basis for such a finding merely because the judge resolved factual conflicts in favor of the Respondent's witnesses. As the Supreme Court noted in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

The judge found, and we agree, that the Respondent's July 1981 change in vacation benefits was prompted by ordinary business considerations rather than by the onset of union activities. However, we note that in sec. III,B, of his decision, the judge's description of the employees affected by this change is somewhat ambiguous. Thus, the judge said that the change affected "a limited number of employees." We note that the record does not reflect the exact number of employees affected; however, it does reflect that this change affected only those employees who had then completed 3 years' employment.

[2] Hereafter, all dates refer to 1981 unless indicated otherwise.

ducted on October 9, 1981, among the "assembly" employees[1] of the Company in an appropriate unit.[2] After the election each party was furnished with a tally of ballots which showed that 37 ballots were cast for the Union, 53 were cast against the Union, and 14 were challenged. In addition there was one void ballot. On October 14, 1981, the Union filed timely objections to conduct affecting results of the election. On March 3, 1982, the Regional Director for Region 32 issued a Report on Objections, Order Consolidating Cases, and Notice of Hearing. The report on objections indicated that some of the objections had been withdrawn by the Union and that a hearing was necessary on the remaining three objections. Those objections related to the Union's assertion that a supervisor was in and around the polling place talking to eligible voters while voting was taking place and the assertion that the Company offered employees company hats at a reduced price of 5 cents each. The report stated that the objections relating to the hats were the same as the allegation in paragraph 6(h) of the complaint in the unfair labor practice case. The Regional Director found that the objections to the election and the unfair labor practice case constituted a single overall controversy. Case 32-CA-3975, 32-CA-4145, and 32-RC-1436 were consolidated for the purpose of hearing before an administrative law judge. In the order, the Regional Director requested that the administrative law judge prepare and cause to be served on the parties a report containing resolution of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of the objections.

Issues

1. Whether the Company, through its foundry superintendent, Douglas Clayton, and its foundry foreman, Ignacio Ortiz, violated Section 8(a)(1) of the Act by coercively interrogating and by making unlawful threats and promises concerning union activities to foundry employees.

2. Whether the Company violated Section 8(a)(1) and (3) of the Act by granting increased vacation benefits on July 22, 1981, to discourage union activity, by reducing the cost of hats to employees on October 6, 1981, in order to discourage union support, and by eliminating overtime for employee Albert Rodriguez in September 1981 because of union activity.

3. Whether the Company violated Section 8(a)(3) and (1) of the Act by laying off 28 foundry employees from on or about November 19, 1981, to on or about February 8, 1982, because of the union activity of the foundry employees.

4. Whether the election in the assembly bargaining unit (Case 32-RC-1436) should be set aside because the Company offered hats to employees at reduced price and/or because Plant Manager Charles Reese was in and around the polling place talking to eligible voters while voting was taking place.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Comprehensive, well-written briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company.

On the entire record[3] of the case, and from my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. BUSINESS OF THE COMPANY

The Company, a California corporation with an office and place of business in Fresno, California, is engaged in the manufacture and sale of irrigation systems. During the 12 months immediately preceding issuance of complaint the Company purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside of California. The Company is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Interrogation, Threats, and Promises by Clayton and Ortiz*

1. Background

The Company manufactures and sells irrigation equipment. It operates a foundry in which sprinkler parts are molded and ground into the required shapes. It also has an "assembly" operation in which the sprinkler parts are assembled into the final sprinkler products. The Company employs approximately 43 employees in the foundry and approximately 104 employees in the "assembly" operation.

In early July 1981 the Union began organizing the Company's employees. Some cards were signed by July 11, 1981, and about 2 days thereafter union leaflets were openly distributed at the Company's parking lot. The petition for an election in Case 32-RC-1436 was filed on August 4, 1981. It sought an election in a bargaining unit

[1] As is more fully set forth below the Company manufactures and distributes sprinkler systems. Components for the sprinklers are molded in the Company's foundry and assembled outside the foundry. The election in Case 32-RC-1436 was in the bargaining unit of "assembly" employees. A separate petition was filed and a separate election was conducted in a bargaining unit composed of foundry employees. The objections to the election considered herein all relate to the "assembly" election. Also as is set forth in detail herein the complaint alleges that the Company violated Sec. 8(a)(3) of the Act by laying off a substantial number of foundry employees. That allegation is unrelated to the "assembly" election. There is no allegation in the complaint that "assembly" employees were laid off in violation of the Act.

[2] The bargaining unit was:

All full time and regular part time employees employed by the Company at its facility located at 4381 North Brawley Avenue, Fresno, California, including production employees, maintenance employees, toolmakers, and shipping and receiving employees; excluding foundry employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

[3] The General Counsel's unopposed motion to correct the transcript of the record is hereby granted. A copy of that motion has been added to the General Counsel's exhibits as G.C. Exh. 13.

that included both the "assembly" and foundry employees. Thereafter the parties agreed to sever the bargaining unit so that there would be two separate units, one consisting of "assembly" employees and a second of foundry employees. As is set forth above in the "Statement of the Case" an election in the "assembly" unit took place on October 9, 1981. The Union lost that election and the Union's objections to the conduct of that election are being considered herein. A separate petition for an election was filed in a bargaining unit of foundry employees. That election was held on November 13, 1981. In that election 33 votes were cast for the Union, 7 against the Union, and 3 ballots were challenged. No objections were filed to that election. The Union is the certified bargaining agent of the employees in the foundry unit. The complaint alleges that the Company violated Section 8(a)(3) of the Act by laying off 27 foundry employees after the Union won the election. There is no allegation in the complaint or contention by the General Counsel that the Company violated Section 8(a)(5) of the Act by refusing to bargain or by bargaining in bad faith with the Union.

2. The alleged unlawful conduct of Douglas Clayton

At the times material herein Douglas Clayton was the Company's foundry superintendent and a supervisor within the meaning of the Act. Company employees Tomas Dominguez, Albert Rodriguez, and Elvio Perez testified to conversations they had with Clayton in which Clayton engaged in coercive interrogation and made unlawful threats and promises relating to union activity. Clayton testified in detail and denied that he made the remarks attributed to him by those three employees. The issue turns on the credibility of the various witnesses.

a. *The assertions of Dominguez*

Tomas Dominguez testified to the sequence of events set forth in the remainder of this paragraph. Sometime in July 1981, while Dominguez was in Clayton's office with no one else present, Clayton told Dominguez that Clayton knew the Union was organizing but that he didn't know who the organizer was.[4] Clayton said that the Union could not secure Dominguez' job but that Clayton would secure Dominguez' job if Dominguez gave him information about the Union. Dominguez replied that he would try to get the information. He also told Clayton that he thought that Albert Rodriguez was passing out the union cards but that he was not sure. Thereafter Dominguez attended union meetings and reported what occurred at those meetings to Clayton. He also told Clayton the names of the employees who attended the meetings. Dominguez said that Rodriguez was the head organizer and that Santiago was helping him to pass out cards. Clayton told Dominguez to gather all the information he could and he told Dominguez that the employees did not know what they were getting into. Clayton repeatedly assured Dominguez that his job would be secure. Dominguez gave Clayton information about union activities on almost a daily basis. Toward the end of September or beginning of October Clayton gave Dominguez a free company hat, buckle, and jacket. In September 1981 Clayton transferred Dominguez from the forklift on which he was working to a molding machine next to Rodriguez so that Dominguez could obtain more information from Rodriguez concerning union activities. Dominguez obtained such information and reported it to Clayton. During a number of those conversations Clayton told Dominguez that, if the Union ever came in, Coson, who owned the Company, would personally lay off everyone or fire them. Also on a number of those occasions, Clayton told Dominguez that if the Union ever came in everyone was going to be laid off or terminated and that Clayton was not going to let a union tell him how to run the place. On November 16, 1981, which was the Monday following the November 13 election in the foundry unit, Clayton told Dominguez that the employees had the Union and that the Union could get them all jobs because he was going to get rid of them all. Clayton said that if he had to he would close the place down. In another conversation Clayton told Dominguez that the employees were all going to get terminated but that Dominguez' job would be secure because Dominguez obtained the information for him. After the election Clayton asked Dominguez to find out who voted against the Union. On November 16 Dominguez overheard Clayton telling Assistant Foundry Superintendent Bart Cummings that orders were slow in coming in but that the Company could keep the place going till January or February when orders picked up. Clayton said that they could run small stuff but now it was going to be a completely different thing. Dominguez was one of the employees who were laid off in the foundry about a week after the election. As Clayton had promised to make Dominguez' job secure, Dominguez asked Clayton what was going on. Clayton told Dominguez that he had to make it look good but that Dominguez should not worry and that he would be called back to work within a week. On a number of occasions thereafter Dominiguez called Clayton on the phone and asked when he would be called back. Clayton responded by saying that the employees had voted for the Union and the Union should find them jobs. When Dominguez pointed out that Clayton had promised to secure his job if he obtained the information, Clayton replied, "I'm sorry. You voted the damn Union. Let them give you—get you guys jobs. If it wasn't for the Union, you would be working right now." Dominguez was not called back with the first group of employees who resumed work in February 1982. Dominguez called Clayton and begged for his job back and Dominguez was then recalled. He was assigned to a grinding machine rather than the forklift that he had previously worked on and his wages were less after the recall than before.[5]

[4] In an affidavit that he swore to prior to the trial Dominguez averred that it was he who went to Clayton and asked whether Clayton was aware that the Union was organizing inside the foundry.

[5] There is no allegation in the complaint that the reassignment or the reduction in wages violated the Act.

Clayton testified at length concerning his conversations with Dominguez. He denied that he ever asked Dominguez to find out what was happening with the Union, denied that he offered job security if Dominguez would get information about the Union for him, denied that Dominguez ever did give information concerning the Union to him, denied that he gave Dominguez a free hat, buckle, or windbreaker, and denied that he ever asked Dominguez to identify union adherents. Clayton acknowledged that he transferred Dominguez from the forklift to the grinder. He averred that he did so because Dominguez talked too much and kept people from working when he was on the forklift. Clayton denied that he put Dominguez at the grinder location to learn from Rodriguez what the Union was doing. Clayton also denied that he told Dominguez that if the Union came in the operation would be shut down or that he said anything to Cummings about laying off because of union activity. He further denied the substance of Dominguez' testimony concerning conversations during the layoff.

If Clayton's testimony is believed, Dominguez made up his story out of whole cloth. Clayton was an extremely convincing witness. His demeanor when he testified was such as to instill confidence in his veracity. His testimony was clear, consistent, and believable. That was not true with regard to Dominguez. Both his demeanor and the substance of his testimony raise questions concerning his credibility. His bearing while he testified seemed to indicate a pride in his assertion that he acted as a spy for the Company, betrayed his fellow employees, and helped the Company violate the National Labor Relations Act. The moral qualities that he attributed to himself were not of such a nature as to inspire confidence in his credibility. As he testified Dominguez gave the distinct impression that he had been coached to put words in Clayton's mouth that would maximize the damage to the Company. After listening to Clayton testify, it is difficult to believe that Clayton was as prolix or as confiding in Dominguez as Dominguez claimed. In addition it is difficult to understand why Dominguez would have been laid off with the other employees if in fact he had spied for the Company as he claimed. If Clayton believed Dominguez to be the key antiunion employee in the plant and if the Company were laying off employees to thwart the Union, Dominguez would not have been laid off. Moreover if Clayton had made the damaging admissions to Dominguez that Dominguez claimed, Clayton would have been very concerned about keeping Dominguez' good will. In such circumstances, Clayton would have known that Dominguez could give damaging testimony against him and it would have been in Clayton's self-interest to avoid antagonizing Dominguez by laying him off. In sum, I believe that Clayton told the truth in his testimony and that Dominguez did not.

b. *The assertions of Albert Rodriguez*

Albert Rodriguez has been employed by the Company since August 1, 1977. He has performed a number of different jobs within the foundry. Rodriguez was a key union adherent. On September 10, 1981, he attended, on behalf of the Union, a Board-conducted hearing. By letter dated September 23, 1981, the Union notified the Company that Rodriguez was a member of the Union's organizing committee and that any coercion, threat, or discrimination against him or other members of the committee would be considered to be unfair labor practices. He appeared as one of the representatives of the Union in the trial of this case and he testified on behalf of the Union. In that testimony he averred that he had several conversations with Clayton.

On September 10 Rodriguez attended a Board hearing and missed a half day of work. He did not call the Company to inform it that he would be late because he was told by a union business representative that that representative would call in for him. When he did report for work, Clayton criticized him for not calling in. Rodriguez testified that Clayton asked him where the "hell" he was that morning and that he answered that he had attended a meeting. Rodriguez averred that Clayton asked him why he did not call in and that he responded that the business agent had called in for him. According to Rodriguez, Clayton said that he would be "goddam" if he would let some union 50 miles away tell him what to do with his employees and that, if Rodriguez were going to do everything the Union told him to do, he could go work for the Union. Dominguez testified that he overheard the conversation. His testimony was similar to that of Rodriguez. Clayton testified that on the day in question Rodriguez did not report to work as scheduled so that he left the machine open for him expecting him to show up; that shortly thereafter he received a call from the Union saying that Rodriguez would not be in; that when Rodriguez did report for work he scolded him for not letting him know that he was coming in late; and that he told Rodriguez that Rodriguez worked for him and no one else.

Sometime after September 10 Rodriguez went into Clayton's office and said that he was thinking about dropping the union business. Rodriguez testified that he told Clayton that the Union could not give job security and that the Company could; that Clayton said that he had been trying to tell the employees that the Union was not going to give them job security but that he could not get that across to the employees; and that Rodriguez said that he would try talking to employees to get them to change their minds. Clayton, in his testimony, acknowledged that Rodriguez came to see him. Clayton testified that Rodriguez asked whether it would help if a few of the employees got together and went to see Coson (the owner of the Company); and that Clayton said that he did not know and that it was up to Rodriguez. Rodriguez testified that later that same day Clayton told him that he had seen the letter from the Union saying that Rodriguez was on the organizing committee and that he told Rodriguez that it was now out of his hands. Clayton acknowledged in his testimony that he told Rodriguez that he had received the letter from the Union indicating that Rodriguez was the official representative.

Rodriguez testified to the following: Sometime between the November 19 layoff and Christmas 1981 Rodriguez called Clayton and asked whether they would be called back soon. Clayton said that the employees would not be called back soon because work was slow and he

did not think he could continue running the crew that he had. Clayton then asked Rodriguez whether the Union had been in contact with him and Rodriguez responded in the negative. Clayton then said that he had tried to warn the employees and that all the Union wanted was their dues. Rodriguez replied that it was a mistake and there was nothing he could do about it but if he had the chance he would do it differently. Clayton then said, "Well, I, I tried to warn you guys. I told—tried to tell you that the old man would, would close the place down. He will—he will not tolerate no union whatsoever."

Clayton in his testimony acknowledged that he had a conversation with Rodriguez after the layoff. He averred that prior to that time Rodriguez had told him that the Union would find a job for him because he could weld and do mechanical work. He averred that he might have asked Rodriguez whether he had heard from the Union in the conversation in question but that was in the context of the prior conversation and that he told Rodriguez that he hoped the Union would find him work because it did not look good at the Company at that time. Clayton averred that he did not believe he asked Rodriguez whether the Union had been in contact with any of the other workers. He averred that he only had one conversation with Rodriguez about the Company shutting down and that that conversation occurred substantially before the one in question. That was the day that Rodriguez said that he did not want to have anything to do with the Union. Clayton averred that at that time Rodriguez said that, if the Union decided to go on strike, the Company would have a new crew in there within 2 or 3 days and Clayton responded by saying that it was quite possible.

Unlike Dominguez, Rodriguez' demeanor while he testified did not shed a cloud on his credibility. Rodriguez appeared to be an honest, straightforward witness, as did Clayton. However key parts of Rodriguez' testimony are difficult to believe. Rodriguez testified in substance that, after the layoff and before the recall, Clayton admitted to him that the Company would not tolerate a union and would close down if necessary. At the time Clayton allegedly made that admission, Clayton knew that Rodriguez had attended the Board hearing on behalf of the Union. He knew that Rodriguez had been officially designated by the Union as a member of the organizing committee. The letter in which the designation was made spoke about the possibility that the Union would file unfair labor practice charges. Clayton knew that there had been a substantial layoff. At that time the Union had been certified as the collective-bargaining agent of the foundry employees. Clayton would have had little to gain by making gratuitous admissions to Rodriguez. He knew that Rodriguez was on the organizing committee and it is reasonable to believe that he knew that any damaging admissions that he made to Rodriguez would be used as evidence to support the contention that the layoffs were motivated by union considerations. When Clayton was on the witness stand, he appeared to be an intelligent man who carefully chose his words. It is difficult to visualize him making the statements attributed to him by Rodriguez under the particular circumstances of this case. In sum, I credit Clayton's testimony with regard to his conversations with Rodriguez and I do not credit Rodriguez' testimony.

c. *The assertions of Elvio Perez*

Perez was hired by the Company on May 7, 1979. He no longer works for the Company. He did work throughout the layoff. He testified that, in mid-December 1981 (which was during the period of the layoff), fellow employee Marcio Vargas called him into Clayton's office and acted as an interpreter. Perez speaks Spanish but little English. He averred that through the interpreter Clayton said, "Are you in touch with the Union? Are you in touch by phone? Are you in touch through the mail? Or do you go constantly to the Union in person?" and that he answered, "No." Vargas did not testify. Clayton in his testimony denied that he ever used Vargas as an interpreter for Perez except possibly to discuss something like a timecard. As is more fully set forth below Perez testified that about a month before the election leadman or foreman Ortiz told him that if the Union came in the employees would all be fired. Perez gave a signed statement to a Board agent in April 1982 when, according to Perez, his memory was better than it was at the trial. In that statement he averred, "Before the election, no one from management ever spoke to me about the Union, not Clayton, not Ortiz, nor Cummings." I do not believe that Perez was a reliable witness and I believe that Clayton was. I credit Clayton and I do not credit Perez. I am unprepared to find any violations of the Act based on Perez' testimony.

3. The remarks attributed to Ignacio Ortiz

a. *Ortiz' supervisory status*

At all times material herein except for the layoff period between November 19, 1981, and early February 1982, Ortiz was the leadman or foreman on the foundry's second shift, which lasted from 3:30 p.m. to midnight. During the layoff he remained at work as a machine operator on the day shift. Two other shifts were eliminated during that time. After the layoff he resumed his duties as leadman or foreman. The complaint alleges and the answer denies that Ortiz was a supervisor within the meaning of the Act. However Owen Glahn, the Company's controller, credibly testified that except for the layoff period Ortiz had the authority to move employees from machine to machine and to assign employees different work during the course of the shift. He also acknowledged that Ortiz did not have to secure prior approval from anyone to take such actions. Ortiz was often the only one with authority who was physically present during his shift. In its brief the Respondent describes Ortiz as "a bottom-rung low-level supervisor."

Section 2(11) of the Act defines "supervisor" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employ-

> ees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The supervisory indicia set forth in that section are listed disjunctively and a person must be found to be a supervisor if he possesses any one of the described forms of authority. If that person possesses the authority to exercise any one of the enumerated functions listed in Section 2(11) he is a supervisor whether or not those powers are actually exercised. *NLRB v. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948); *Redi-Serve Foods*, 226 NLRB 636 (1976). Except for the time during the layoff, Ortiz had exercised, at the very least, authority to use his independent judgment in assigning employees. I find that except for the period during the layoff he was a supervisor within the meaning of the Act. During the layoff he was a rank-and-file employee and the evidence is insufficient to establish that he had either real or apparent supervisory authority.

Foundry employees Solome Ovalle, Elvio Perez, Santiago Marquez, and Albert Rodriguez testified that they had various conversations with Ortiz in which Ortiz made unlawful threats and engaged in other unlawful conduct. Ortiz testified in detail and, in substance, denied the remarks attributed to him.

b. *The assertions of Ovalle*

Solome Ovalle testified that, a few days before the November 13, 1981 election, Ortiz asked him whether he was with the Union or with the Company. Ovalle also testified that sometime after the election Ortiz told him that the employees were going to be laid off because they were involved with the Union. Ortiz, in his testimony, denied that he questioned Ovalle about the Union and further denied that he told Ovalle that employees were going to be laid off because they were involved with the Union. Based on Ovalle's demeanor and on the wildly inconsistent statements he made during his testimony, I have no hesitation in totally discrediting Ovalle. At one point in his testimony he averred that he did not have any conversation with Ortiz about being laid off either before or after the election. Then he equivocated on that matter. Still later he averred that Ortiz told them that they were going to be fired because they were involved with the Union. Still later he averred that there were simply rumors around. Thereafter he changed his testimony again. In viewing Ovalle's testimony as a whole, it appears that he has little respect for the truth and that his testimony cannot be relied on. Ortiz, on the other hand, testified in a direct manner without any internal inconsistencies and his demeanor did not shed doubt on his credibility. I credit Ortiz and do not credit Ovalle.

c. *The assertions of Perez*

Elvio Perez testified that about a month before the election of November 13, 1981, Ortiz told him that the Union was not good, that if the Union did come in they would all be fired, that Perez should not keep going to the Union because they were going to be fired, and that Ortiz realized that when employees were gone they were at union meetings. Perez further testified that, on the night the layoffs occurred, Ortiz told him to stop going around with union people or he would be fired. Perez also averred that he had a number of telephone conversations with Ortiz in which Ortiz told him that the Company would not take laid-off people back because it did not want them anymore. In April 1982 Perez gave a statement to a Board agent. He averred that his memory was better when he gave the statement than it was at trial. Nothing was said in that statement about any remarks that Ortiz had made to him. The statement did say, "Before the election, no one from management ever spoke to me about the Union, not Clayton, not Ortiz, nor Cummings." Based on the discrepancies between his affidavit and his testimony, I have serious reservations as to Perez' credibility. As indicated above Ortiz appeared to be a believable witness. I credit Ortiz and I do not credit Perez.

d. *The assertions of Marquez*

Santiago Marquez testified that 2 weeks before the election Ortiz told him that the Union was not convenient for them, that it was only going to cost them more money, and that it would not do them any good. Marquez further averred that 3 or 4 days after the first conversation Ortiz told him and other employees to vote against the Union because if they voted for the Union they were going to be laid off, and that he also told them if the Union came in they were going "to be under my balls." Marquez testified to other conversations in which Ortiz told him that the Union was no good and that the Union had just lost them a lot of time. Ortiz, in his testimony, denied that he made the statements attributed to him by Marquez. At times Marquez' testimony was a bit difficult to follow. On direct examination Marquez testified that about a week and a half before the November 13 election (which would place it about November 3, 1981) Ortiz unequivocally told him that if the employees voted for the Union they were going to be laid off. A layoff did occur on November 19, 1981. On cross-examination Marquez testified that no one ever told him that a layoff might take place and that he had no information which might lead him to believe that he might be laid off. I have doubts as to Marquez' candor and, as is set forth above, Ortiz was a believable witness. I credit Ortiz and do not credit Marquez.

e. *The assertions of Albert Rodriguez*

Albert Rodriguez testified that about a week before the election he had a conversation with Ortiz concerning safety glasses worn by a fellow employee. Rodriguez averred that he told Ortiz that everyone would be better off if Ortiz treated workers better and that Ortiz replied by saying, "You don't have to worry about it, that before long you and your followers are going to be out." Rodriguez further averred that he asked Ortiz how Ortiz knew who his followers were and that Ortiz replied, "Well, we have fingers, you know." According to Ro-

driguez he understood "fingers" to mean "informers." Ortiz, in his testimony, denied that he had any such conversation with Rodriguez. As found above I believe that Rodriguez was less than candid with regard to conversations he had with Clayton. I do not have full confidence in his veracity and I am unprepared to discredit Ortiz on the basis of Rodriguez' testimony. I credit Ortiz and do not credit Rodriguez.

In sum, I recommend that all of the allegations in the complaint that allege that the Respondent violated the Act through statements of Clayton and Ortiz be dismissed.

B. *The Allegation that the Company Granted Increased Vacation Benefits to Discourage Support for the Union*

On July 22, 1981, the Company posted a notice on its bulletin board changing the rules with regard to vacation. It said that effective immediately employees would receive 1 week's vacation after the first and second year of employment, and 2 weeks' vacation after 3 years' employment.[6] According to the testimony of Glahn, prior to that time the Company's policy had been to give 1 week's vacation after a year and 2 weeks' after 3 years'; and that was changed to provide 2 weeks' vacation after 2 years rather than after three. There appears to have been substantial confusion between when the third week began accruing and when it was to be paid. In addition there appears to have been confusion with regard to the old policy. Tomas Dominguez and Albert Rodriguez, both of whom were hired in the summer of 1977, would have finished their third year of employment in the summer of 1980 but they both received only 1 week's vacation in 1980. The Company received a number of complaints about the vacation policy. Employees complained to Albert Rodriguez, who in turn spoke to Clayton about the complaints on a number of occasions. In July 1981 Rodriguez again spoke to Clayton about vacations. Clayton appeared surprised that Rodriguez had only been receiving 1 week and he said that he would do what he could to get 2 weeks for Rodriguez. In mid-July 1981 Company Controller Glahn was told by either Foundry Superintendent Clayton or Clayton's assistant, Reese, that comparable firms gave 2 weeks' vacation after 2 years. Glahn talked about the matter to Coson and about July 20 Coson decided to change the vacation policy by giving 2 weeks' vacation after 2 rather than 3 years of employment. The change of vacation policy had no impact on Dominguez or Rodriguez because under either the old or the new policy they would have been entitled to 2 weeks' vacation as they both had worked for more than 3 years.

About July 13, 1981, union leaflets were openly distributed at the Company's parking lot. There is no other evidence in the record to indicate that the Company had knowledge of any union activity before the change in vacation plan was made. As the union distribution was made at the Company's premises and as it was done in the open, an inference is warranted that it was observed by company officials. The change in company policy with regard to vacations took place about a week after the Company learned of the union activity.

During a union organizational drive an employer has a duty, in deciding whether to grant benefits, to make its decision as he would if the union were not in the picture. A change in vacation benefits is neither lawful nor unlawful in itself. It is lawful if it is motivated by ordinary business considerations and it is unlawful if it is motivated by the union's presence. *Marines' Memorial Assn.*, 261 NLRB 1357 (1982), and cases cited therein.

In the instant case the timing of the change in vacation benefits is suspicious. It occurred about a week after the Company learned that there was union activity. However there is no credited evidence that the Company bore an animus against union activity that would give it a motive to change its benefit policies to discourage union activity. Moreover the Company presented a plausible explanation of why it changed the policy when it did. There had been complaints about the prior policy, inquiries indicated that other firms in the area gave better benefits, and the changes were made for those ordinary business reasons. At the time the changes were made the Company could not have known whether the union activity was a minor passing phenomenon or a serious organizational drive. Even if the Company did guess that it was a serious drive, it is unlikely that the company officials thought that such a drive could be thwarted by the minor changes in the vacation policy that were made. The change affected only a limited number of employees and there is no indication that the Company used the change as a propaganda device against the Union. Under all these circumstances I am satisfied that the Company has established that the change in vacation policy was based on ordinary business considerations rather than union considerations.

C. *The Allegation That the Company Eliminated Overtime for Albert Rodriguez Because of His Union Activity*

For much of the time during Albert Rodriguez' employment with the Company he was permitted to monitor the temperature controls on the furnaces during his regularly scheduled half hour lunch period. For that half hour he was given time-and-a-half-pay.[7] The Company's records show that Rodriguez did not work any overtime the weeks ending August 1, 8, and 15, 1981. Rodriguez was on vacation the weeks ending August 22 and 29, 1981. When he returned from vacation he again worked

[6] The notice read:

Effective immediately each employee shall receive one week, or forty hours vacation pay at the conclusion of each year during the first and second year of employment.

Each employee will receive 80 hours or two weeks' vacation pay at the conclusion of each year from the third to the tenth year of employment. Each employee will earn 80 hours vacation pay during the third year.

At the conclusion of the eleventh year and each year thereafter, each employee shall receive three weeks' paid vacation or 120 hours a day.

All other provisions regarding vacation shall remain the same as previously.

[7] The record is not clear as to how regularly Rodriguez performed those duties. The company records show that on a number of occasions Rodriguez did work an 8- rather than an 8-1/2-hour day.

overtime on the furnace. That lasted until September 11, 1981, when he was relieved of his furnace overtime duties and the work was given to an employee who would have been working anyhow and was therefore paid straight time pay. Rodriguez was only given the overtime duty on a few occasions after that date.

The General Counsel contends that Rodriguez was removed from the overtime work on September 11 because of his union activities. The background for this incident is set forth in detail above in paragraph A,2,b. Rodriguez had attended a Board hearing on September 10 and the Company knew that he appeared there for the Union. Rodriguez missed a half day's work on that day and when he arrived for work he was scolded by Clayton for not personally calling in before he was scheduled to start.

Rodriguez testified that Assistant Foundry Superintendent Bart Cummings told him on September 11 that Rodriguez could not watch the furnaces during his lunch hour anymore because he had too many close connections with the Union. Cummings in his testimony flatly denied that he made any such statement to Rodriguez. According to Cummings he told Rodriguez that the furnace work would be done by other people so that they did not have to pay the overtime. Cummings appeared to be a credible witness and, as is set forth above, I believe that Rodriguez was less than candid in much of his testimony. As between Cummings and Rodriguez I credit Cummings.[8]

Cummings also testified that at the time he removed Rodriguez from the overtime work the Company was trying to cut costs and that he could cover the work in question with people who were already working so that no overtime would be needed. As is set forth below with regard to the subsequent layoff, it was true that the Company was having difficulties at that time.

Rodriguez engaged in protected activity on September 10 when he attended the Board meeting. The following day overtime was taken away from him. The timing was suspicious. However, I believe that Rodriguez was trying to make his case by putting words in Cummings' mouth that would prove a causal connection between the loss of overtime and the union activity. I have credited Cummings in that regard and that leaves very little but suspicious timing. Timing alone must be viewed with caution. Where there is a continuing organizational drive, there is protected union activity at almost any date. It is possible that no matter when a company takes personnel action there will be some protected activity that lies near in time to it. Timing alone is insufficient to establish a causal connection. Here, there is no credited evidence that the Company harbored the type of animus against union activity that would give it a motive to take away Rodriguez' overtime because of his union activity. The Company's explanation that it was simply trying to save costs during a difficult economic time was quite plausible. The General Counsel has failed to establish by a preponderance of the credible evidence that overtime was taken away from Rodriguez because of his protected activity.

[8] Rodriguez testified that things changed after his September 10, 1981 confrontation with Clayton and that, after that time, he was no longer allowed to go out and pick up parts and he was assigned to difficult and dirty work. Clayton, in his testimony, denied that he treated Rodriguez different from the other employees or that he treated Rodriguez differently before and after the September 10 incident. I credit Clayton and not Rodriguez.

D. *The Hats with the Company Logo*

Paragraph 6(h) of the complaint alleges that on or about October 6, 1981, the Company granted a benefit to employees by reducing the cost to employees of headgear in order to discourage support for the Union. The same incident is the subject matter of one of the objections to the election in the "assembly" bargaining unit.

For a short time during the union organizational drive the Company sold hats with the Company's logo to employees for about $2.30, which was the amount the Company paid for the hats.

During the election campaign the Union gave buttons and hats with the Union's logo to employees. The election in the "assembly" unit was on October 9, 1981. About a week before that election, for a period of 2 or 2-1/2 hours, the Company made hats with the Company's logo available to employees for 5 cents each. The hats were sold in the Company's quality control area which was under the supervision of John McComas. The money was put in a tin can and no list was kept as to who bought hats. A large number of employees purchased the hats for 5 cents each. Thereafter some employees wore company hats, some wore union hats, some wore both hats at the same time, and others wore no hats. There is no allegation in the complaint nor contention by the General Counsel that the Company's actions with regard to the hats constituted a form of interrogation or surveillance. The complaint alleges that the Company's action constituted a grant of benefit to employees to discourage union support. The Company used the hats as a campaign tactic. Both the Company and the Union used their logos on hats for that purpose.

It has long been held "that the granting of free dinners and beverages to the employees by either the employer or the union during an election campaign constitutes legitimate campaign activities." *Agawam Food Mart*, 158 NLRB 1294, 1297 (1966), enfd. 386 F.2d 192 (1st Cir. 1967). See also *Gould, Inc.*, 260 NLRB 54 (1982); *Delchamps, Inc.*, 244 NLRB 366 (1979), enfd. 653 F.2d 225 (5th Cir. 1981); *Northern States Beef*, 226 NLRB 365, 376 (1976). In the instant case the hats with the Company's logo which were distributed as part of the Company's campaign constituted even less of a benefit to the employees than the free dinners in the above-cited cases. In *Jefferson Stores*, 201 NLRB 672 (1973), the Board found that the company did not interfere with an election when it distributed "vote no" cards to employees and the distribution was unaccompanied by threats or promises of benefit. The distribution of caps with the company's logo was even less coercive than the distribution of "vote no" cards would have been.

In *Trailways*, 237 NLRB 654, 661 (1978), the Board adopted the decision of an administrative law judge which held that the free distribution to employees of T-shirts with company slogans printed on them during an organizational campaign violated Section 8(a)(1) of the

Act. In that case the distribution was made in the context of numerous unfair labor practices and the administrative law judge emphasized the "benefit" aspects of the distribution without mention of any legitimate "campaign tactics." In *R. L. White Co.*, 262 NLRB 575, 576 (1982), the Board took a more detailed look at a similar situation, holding:

> A party to an election often gives away T-shirts as part of its campaign propaganda in an attempt to generate open support among the employees for the party. As such, the distribution of T-shirts is no different than the distribution of buttons, stickers, or other items bearing a message or insignia. A T-shirt has no intrinsic value sufficient to necessitate our treating it differently than other types of campaign propaganda, which we do not find objectionable or coercive. See, e.g., *Lach-Simkins Dental Laboratories, Inc.*, 186 NLRB 671, 672 (1970). Accordingly, we hereby dismiss this allegation of the complaint.

The *R. L. White Co.* decision is controlling in the instant case. I therefore recommend that that allegation in the complaint be dismissed and the parallel objection be overruled.

E. *The November 1981 Layoff*

Between July and November 18, 1981, the foundry had been working on a three-shift basis. On November 19 and 20, 1981, the Company reduced the operation to one shift and laid off 28 foundry employees. Some employees were laid off from each of the three shifts and the remaining employees were consolidated into the day shift. Between February 8 and 15, 1982, 25 of the 28 laid-off employees were recalled. There was no contention that the Company violated Section 8(a)(3) of the Act by its refusal to recall the other three employees at the time the others were recalled. The General Counsel does contend in effect that the layoff that began on November 19 was a reprisal by the Company against the employees because they voted to select the Union as their bargaining agent in the November 13, 1981, election. The Company denies that contention and asserts that the only motivation for the layoff was economic.

The controlling law is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981),[9] cert. denied 455 U.S. 989 (1982), in which the Board applied the "test of causation" that had been articulated by the United States Supreme Court in *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977). In reliance on the Supreme Court decision the Board held:

> Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

[14] In this regard we note that in those instances where, after all evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are casually related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

The threshold question is, therefore, whether the General Counsel has by a preponderance of the credible evidence made out a prima facie showing sufficient to support the inference that the layoff was motivated by the employees' protected activity.

The General Counsel introduced evidence that if fully credited would have established that the employees engaged in a series of protected activities leading to the election of the Union as their bargaining agent on November 13, 1981; that the Company had knowledge of that protected activity (particularly the results of the election); that the Company harbored a virulent animosity against employees who engaged in union activity; and that it expressed that animosity by the unlawful grant of benefits to discourage union activity, by eliminating overtime for an employee, by coercively interrogating employees, and by making unlawful threats and promises; that supervisors threatened employees with a layoff if they selected the Union to represent them; and that supervisors thereafter admitted to employees that the layoff in question was caused by the employees' union activities. All of that testimony as well as the testimony adduced by the Company in response thereto was evaluated in sections A through D, above. As is set forth therein all of the General Counsel's assertions with regard to the Company's animus and independent violations of Section 8(a)(1) of the Act have failed for a lack of credible evidence. The allegations with relation to the grant of benefits (vacations and hats) have failed as a matter of fact and law. All that is left is evidence that the Compa-

[9] While the First Circuit Court of Appeals enforced the Board's Order, that court disagreed with the Board with regard to the exact nature of the Employer's burden once the General Counsel had established a prima facie case. In the court's language:

> Thus, the employer in a section 8(a)(3) discharge case has no more than the limited duty of producing evidence to balance, not to outweigh, the evidence produced by the general counsel.
>
> The Board may properly provide, therefore, that "Once [a prima facie showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB [1083, 1089] (footnote omitted). The "burden" referred to, however, is a burden of going forward to meet a prima facie case, not a burden of persuasion on the ultimate issue of the existence of a violation.

The Third and Seventh Circuits have expressed their agreement with the First Circuit in *Behring International v. NLRB*, 675 F.2d 83 (3d Cir. 1982); *NLRB v. Webb Ford*, 689 F.2d 733–735 (7th Cir. 1982). The Ninth, Eighth, Sixth, and Fifth Circuits have indicated their agreement with the Board's position. *Zurn Industries v. NLRB*, 680 F.2d 683 (9th Cir. 1982); *NLRB v. Fixtures Mfg. Corp.*, 669 F.2d 547 (8th Cir. 1982); *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442 (6th Cir. 1981); *NLRB v. Charles H. McCauley Associates*, 657 F.2d 685 (5th Cir. 1981).

ny knew of union activity that culminated in the employees' selecting the Union as their bargaining representative on November 13 and the layoff of 28 foundry employees on November 18 and 19. The timing of the layoff does raise a suspicion with regard to the Company's motive for the layoff. However mere suspicion is insufficient to support a prima facie case. There is no credible evidence to show that the Company possessed the type of hostility against union activity that would make it reasonable to believe that the layoff was a reprisal against the employees for their selection of the Union in the election. With regard to motivation it is noted that the Union did win the election and the layoff could have had no impact on the Union's right to bargain for the employees. There is no allegation that the Company has refused to bargain in good faith. If the Company had an economic need for the production that would flow from a three-shift operation, it would have had to have been very strongly motivated against the Union for it to reduce its foundry production by two-thirds when it eliminated two shifts. There is no credible evidence of such motivation. In sum the General Counsel has not established a prima facie case that the Company violated Section 8(a)(1) and (3) of the Act by laying off the 28 employees. However even if the suspicious timing were enough to establish such a prima facie case, the Company's economic defense was substantial enough to demonstrate that the layoff would have happened even in the absence of protected activity.

The record is replete with documentary evidence relating to economic factors that were considered by the Company in deciding to lay off the employees. Both the General Counsel and the Company argue extensively in their briefs that the company records support their differing conclusions. As with all statistical data there is room for interpretation. However the test is not whether the General Counsel would on hindsight have acted differently. The question is whether the Company made business decisions based on available information or whether the decisions were so unrelated to the available facts that the Company's economic defense should be discounted. The Company contends in substance that it carefully monitored its monthly sales, orders on hand, finished goods on hand, accounts receivable, debts, and debt service charges, and that its decisions with regard to determining the number of hourly employees it needed were based on its projection of production needs. The Company's records show that there were substantial changes in the number of employees in the period before the union activity began as well as after. There were layoffs in both the assembly and foundry units, both before and after the union activity began. The Company's contention that the depth and length of the layoffs were related to the economic realities of its business was substantially supported by the documentary evidence.

Though the Company began business in 1975, the key date for evaluating the Company's records is March 15, 1980. On that date the Company purchased from Johns Manville the inventory, equipment, and name of the Bruckner Company.[10] Upon acquiring Bruckner, the Company expanded dramatically and almost doubled its business. The purchase was on March 15, 1980, and it is therefore appropriate to review the employee complement after that date.[11]

In April 1980 the Company employed 42 hourly rated employees in the foundry. In addition the Company employed 104 hourly rated assembly and administrative employees (jointly referred to as assembly employees). The number of employees in the foundry remained between 48 and 41 throughout the remainder of 1980. With a few minor variations the employee complement in the assembly side of the plant grew throughout the rest of that year from 104 to 137. From January through May 1981 the employee complement in both departments remained fairly constant. The foundry varied between 43 and 48 while the assembly varied from 127 to 134. Beginning in January 1981 the Company's backlogged orders[12] began to decline precipitously. They dropped from 835 in January to 610 in February. The orders remained in the 570 to 640 range from February 1981 through July 1981. The number of orders presaged a future reduction in sales and a need to reduce production. That anticipated situation proved to be true as the Company's sales went from a high of $1,240,000 in June to $400,000 in November 1981. Beginning in May 1981 the Company began laying employees off in the assembly department. There were 5 employees laid off in May, 3 in August, 4 in September, 15 in October, and 4 in November 1981. The foundry employees also suffered a layoff in June 1981. The Company went from three shifts in the foundry to one shift plus additional grinding work on a second shift. Some 20 employees were laid off for about a month during June and the employee complement went from 46 foundry workers in May to 26 in June 1981. Backlogged orders rose slightly from 570 in June to 635 in July 1981 and the laid-off foundry workers were recalled in July 1981. The three-shift operation was resumed. Beginning in July the backlogged orders began to decline precipitously. They fell from 635 in July to 340 in November 1981. The sales rose from $1,060,000 in July to $1,220,000 in August 1981 but thereafter they began to plummet. They fell from $1,220,000 in August to $400,000 in November 1981. As is set forth above, during that period, the number of employees in the assembly department continued to decrease and there were a number of layoffs.

The first union activity began in early July 1981. That was after the June 1981 layoff in the foundry and about the time that the foundry employees were being recalled. There is no contention that the continuing pattern of layoffs in the assembly department violated Section 8(a)(3) of the Act. From July to November while the employee

[10] Coson was a major stockholder of Bruckner when Bruckner was sold to Johns Manville years before. On March 15, 1980, Royal Coach, which is wholly owned by Coson, purchased Bruckner from Johns Manville.

[11] The General Counsel in his brief relies on records relating to an earlier date. One of the problems with that position is that if accepted it would lead to the conclusion that neither the June nor the November 1981 layoffs in the foundry were economically motivated. However the June layoff began before any union activity and therefore could not have been based on anything other than business considerations.

[12] The number of orders would not indicate the size of any order. However the size tended to average out and the number of orders gave an indication of the work to be done.

complement in the assembly side went from 116 to 84, the employee complement in the foundry remained substantially the same, varying only from 43 to 46. Fluctuations were easier to handle among the assembly employees than in the foundry. The employees in the foundry worked as an integrated unit and it was difficult to reduce the number of employees on a particular shift. With the exception of some grinding work that could be done it was necessary to treat each shift more or less as an entity so that an entire shift would be retained or laid off.

Beginning in August 1981 Company Controller Glahn, who kept himself apprised of all aspects of the Company's economic situation, came to the conclusion that a major layoff in the foundry was going to be necessary. On a number of occasions including late September or early November he spoke about the situation to James Coson, the Company's owner and president. Coson wanted to lay off foundry employees in October 1981 because of poor sales and poor projection of future sales. At that time the Company was projecting about $400,000 in sales for November and in fact that projection proved accurate. In November the Company had about $2,376,000 worth of finished goods in stock and about $2,468,000 worth of work in processs. With the sales projections as low as they were Coson believed that there was no need to keep up production as the existing inventory would last for a long time and there were enough castings already made in the foundry to keep everyone busy for several months. Glahn's thinking with regard to the layoff was also influenced by the cash flow situation, the amount of accounts receivable, the amount of loans and high interest rate on the loans.

At that time the Company knew that there would be an election in the foundry. Glahn called Bob Cherry, a labor counselor at the Valley Employers Association, and told him the situation. Cherry told him in effect that anything the Company did with regard to a layoff could cause the Company problems. Cherry pointed out that, if there were a layoff prior to the election, there could be a claim that there was an improper layoff, but that, if the Company waited until after the election, there could also be a claim that the layoff was an action against the Union. Cherry's ultimate recommendation was that the Company wait until after the election for the layoff. Glahn and Coson took that advice.[13]

About 5 days after the election, the layoff was put into effect and the Company reduced its foundry operation from three shifts to one. During the period of the layoff the backlogged orders continued to decrease, from 320 in November 1981 to 255 in January 1982. Between January and February 1982 there was a small increase in orders from 255 to 280. In February the laid-off foundry employees were recalled. The sales for January 1982 were $480,000. In February they rose to $780,000 and in March to $1,240,000.

Based on the above evidence, the Respondent has established a sound economic basis for the November to February layoff in the foundry. There had been a similar layoff in the foundry in June 1981 before the union activity began. The June layoff did not reach as many employees and did not last as long as the November layoff but the economic situation in November was worse than it had been in June. There had been substantial layoffs in the assembly department and there is no contention that those layoffs violated the Act. The Company's action with regard to the layoffs before the union activity was not different in nature than it was after the union activity. Moreover credible evidence offered by the Company establishes that the foundry employees who were retained during the November to February layoff were not chosen on the basis of any union considerations. Assistant Foundry Superintendent Bart Cummings credibly testified that he decided which employees were to be retained and he gave a detailed and believable explanation of why each individual was retained.[14]

In sum I find that the Company did not lay off the 28 foundry employees in November 1981 because of protected activities and I recommend that that allegation of the complaint be dismissed.

F. *The Objections to Conduct Affecting the Election in the Assembly Unit—Case 32-RC-1436*

There are only two objections before me. The first relates to the Company's preelection sale of hats with the Company's logo to employees at 5 cents a piece. That objection paralleled paragraph 6(h) of the complaint and was fully considered in section D, above. As found therein that objection must be overruled. The other objection was that a supervisor was in and around the polling place talking to eligible voters while the voting was taking place. That objection is considered below.

The election in the assembly unit took place on October 9, 1981. Before the election began the Company's plant manager, Charles Reese, prepared for himself a schedule setting forth when employees were to be released from work to vote. He personally went from department to department and told the employees that it was time to vote. After the election began he realized that the voting was going faster than he anticipated so he deviated from the schedule and released people to vote in such a manner that there could be a steady flow of voters. On occasion he walked with groups of employees

[13] There is no allegation in the complaint nor does the General Counsel or the Charging Party contend that the Company violated the Act by delaying a layoff.

[14] Ortiz and Steve Rodriguez, both of whom had been foreman, were retained and worked on the hunter machine so that they could be put back as foreman when the laid-off employees were recalled; Marcio Vargas was kept because he had been a foreman at one time in the grinding area and he was used to train new people; Frank Bardonnes was kept because he was the only maintenance man at the foundry; Gilberto Gonzalez was kept as a core maker because he had been a leadman in that area; Curtis Stokes was retained because he worked around foundries since 1960 and he had worked on one special piece of equipment since the Company obtained it; Louis Briseno was retained because of his ability to do a number of different jobs and because he had been connected with the foundry business since at least 1965; Robert Good was retained because he had experience with another company as a leadman and he had good judgment for particular work that was needed in sorting castings; Caesar Ramos was retained because he did several jobs and was as qualified as anyone there; Avreilo Morales, Gregoria Rosas, Jose Flores, Albio Perez, and Frank Roman were retained as grinders because they were the fastest grinders the Company had; Barocio was retained because he was a furnace operator; and Robert Hernandez was retained because he was the most qualified pour-off man the Company had.

to a location about 50 feet from the voting place where they lined up to vote. The voting place itself was in a building called the old shipping department which had open rollup doors. On one occasion he walked to the open doors, stuck his head into the old shipping department, and asked the Board agent if the employees were coming fast enough. The Board agent replied that they were but that Reese did not belong there and that he should leave. At that time there were no employees in the voting place.[15] While Reese was between the voting place and the location 50 feet away where employees were lined up to vote, Shirley Sacra came near the voting place and complained to the Board agent that Reese should not be there. The Board agent told them both to leave and they did. Reese credibly testified, and there is no evidence to contradict that testimony, that he did not have any conversations with the employees other than to tell them it was time to vote.

In *Milchem, Inc.*, 170 NLRB 362 (1968),[16] the Board set aside an election where a union official engaged in sustained conversations with prospective voters who were waiting to cast their ballots. The Board held:

> Careful consideration of the problem now convinces us that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations.

However the Board went on to state (at 363):

> But this does not mean that any chance, isolated, innocuous comment or inquiry by any employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles."

In the instant case Reese did not engage in any prolonged conversations with employees. He simply told them when it was time to vote. His presence at the open door of the polling place and his question to the Board agent concerning whether the voters were coming fast enough took place when there were no employees in the voting place. His conduct in that regard was innocuous. Nothing that Reese did was of sufficient gravity or impact to warrant setting aside the election.[17] I therefore recommend that that objection be overruled. As I am recommending that both of the outstanding objections be overruled, I further recommend that the results of the election be certified.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has not established by a preponderance of the credible evidence that the Company violated the Act as alleged in the complaint.
4. The objections to the election in Case 32-RC-1436 have not been established.

On the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended

ORDER[18]

The complaint is dismissed in its entirety.

IT IS FURTHER RECOMMENDED that the objections to the election held on October 9, 1981, in Case 32-RC-1436 be overruled and that the results of that election be certified.

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[15] Shirley Sacra testified that she was about 50 yards away watching the polling area through binoculars. Under direct examination she testified that employees were in the voting place when she saw Reese put his head in. However on cross-examination she testified that she did not recall whether there were employees in the voting place but that she saw Reese talking to employees who were lined up to vote and were standing about 50 feet from the voting place. Employee Vaughn Patterson, who was a company observer, credibly testified that he heard Reese ask the Board agent whether the employees were coming fast enough and at that time there were no employees in the voting place.

[16] See also *Modern Hard Chrome Service Co.*, 187 NLRB 82 (1970).

[17] See *Hedison Mfg. Co.*, 249 NLRB 791, 826 (1980), enfd. 643 F.2d 32 (1st Cir. 1981); *Century City Hospital*, 219 NLRB 52 (1975).

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.